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CURRENT TOPICS.

In the famous case of Young v. Grote, 4 Bing. 253, it was held that one who signs a negotiable instrument without exercising ordinary care and prudence in seeing that it is so drawn as not to afford any unnecessary facility for fraudulent alterations, will be liable upon such an instrument in its altered form, in the hands of an innocent holder for value. Substantially the same doctrine was expressed in another case, where it was said "that where one of two parties, neither of whom has acted dishonestly, must suffer, he must suffer who, by his own act, occasions the confidence and subsequent injury of the other." Isnard v. Towes, 10 La. An. 103.

This doctrine being regarded as established, it sometimes becomes a matter of interest and difficulty to determine whether, in a given case, such care and prudence have been exercised, for the cases can not be construed to "decide that the maker would be bound to a *bona fide* holder on a note fraudulently altered, however skillful that alteration might be." The question whether such care and prudence have been exercised is usually one for the jury, though a case can easily be imagined in which the lack of precaution would be so glaring as to make it the duty of the court to decide as a matter of law that the maker was bound thereby. Leas v. Walls, however, recently decided by the Pennsylvania court, is an apt illustration of what the province of the jury is in such cases. There a note for "eight" dollars, payable "nine" days after date, was altered by the principal debtor by the addition of "y" to one word and "ty" to the other, so as to become a note for "eighty" dollars, payable "ninety" days after date, and in an action against the surety, the question whether the defendant, in signing the paper while there was sufficient space for the addition of the letters in question, was held to be a question of fact and within the province of the jury. Say the court:

"In the present case, the plaintiffs are not satisfied with having the question of negligence on the part of the defendant submitted to the jury. They insist that the court should have held that the defendant was guilty of negligence, as matter of law, in not taking such precautions as would certainly have prevented the alteration of the note. The alteration consisted in adding a single letter 'y' to the word 'eight,' so as to make the note read as for eighty dollars instead of eight. The instrument was a printed blank with an open space for the insertion of the amount, the word 'dollars' being printed at the end of the space. The word 'eight' was filled in at the beginning of the space, and all the rest of the blank to the word 'dollars' was filled with an elongated scroll. It happened that a very slight space, about an eighth of an inch, was left between the end of the word 'eight' and the beginning of the scroll. In that diminutive spot the letter 'y' was inserted in such a way as to appear quite natural. * * * In these circumstances, to hold that the defendant was so palpably guilty of negligence in not taking sufficient precautions against forgery, as that the jury could not be permitted to determine the question, and the court must determine it as matter of law, would be equivalent to holding that the maker of a negotiable instrument must so execute it as to prevent the possibility of alteration in any event. Such a doctrine would be monstrous and contrary to every legal principle. It has never been announced by any court, and it is scarcely credible that it ever will be. The word 'eight' is perhaps the only one that can be altered so as to express a larger sum by the addition of a single letter, and was probably selected by the forger in this case for that reason. Other words require either two letters as 'ty' in 'sixty,' 'seventy' and 'ninety,' or an additional word. The defendant testified that when he signed the note, the scroll was in the open space on the note, just as it was at the trial. The jury has found that there was no lack of ordinary care in not observing that a single letter might be added in the very small space immediately following the letter 't' in the word 'eight,' and in this we quite agree with them. In the common experience of men, very few persons write their words so closely together that a single letter can not be added at the end of one of them without attracting attention."

SEALED INSTRUMENTS, EXECUTED IN BLANK.

It was anciently said of instruments under seal: "The agreement must be all written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper or parchment, albeit he do, therewithal, give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed;" [1] and this, we take it, would be regarded as the law to-day in a case in which the entire body or substance of a deed was sought to be inserted,[2] notwithstanding the weight of at least one recent case of a conflicting tendency.[3] The reasons for this rule, which are of a purely technical nature, are thus succinctly stated in the early Tennessee case of Gilbert v. Anthony:[4] "Deeds are evidence of a higher nature than parol contracts, and there are great and important distinctions between the operation and effect of these different species of contracts. The reason of which is that, the first are supposed to be made upon greater deliberation and with greater solemnity; they are first to be written, by which they are exempted from that uncertainty arising from the imperfection of memory, to which unwritten contracts must always be exposed; they are then to be sealed by the party to be bound, and lastly to be delivered by him, which is the consummation of his resolution; none of this deliberation, and little of this solemnity, is to be found in the signing and sealing of a blank piece of paper, on which anything may afterwards be written, and whether with or without the consent of the person who signed it, must depend entirely on oral testimony subject not only to the uncertainty arising from the imperfection of human memory, but exempted from those checks on perjury which would exist in a deed regularly executed, which could only be altered by erasure or interlineation." Chief Justice Marshall, in United States v. Nelson,[5] the leading American case upon this subject, recognizes the purely technical basis upon which a plea of *non est factum* must rest in a case where the agreement written above the signature and seal is in accord with the obligor's instructions. That case was upon a paymaster's bond which, at the time it was signed by the sureties, was merely a printed blank without the name of the principal, the date, or the amount of the penalty, all of which matter was subsequently inserted. The court held it void, placing its decision upon the ground of authority, saying: "If this question depended on those moral rules of action which, in the ordinary course of things, are applied by courts to human transactions, there would not be much difficulty in saying that this paper ought to have the effect which the parties, at the time of its execution, intended it should have. But there are certain technical rules growing out of the state of things, when many of our legal principles originated, which are firmly engrafted on the law, and still remain a part of it, though the circumstances in which they had their birth are totally changed. Perhaps every distinction between a sealed and an unsealed instrument is of this description. But the distinction, and the rules which are founded on it, have taken such a fast hold of the law that they can be separated only by the power of the legislature. Till that authority shall interpose, the courts must respect the rules as they are found in adjudged cases."

When, however, it was sought to apply the principles of these decisions to the case of one who signs and seals an instrument in which the agreement is substantially written out, but with some material portion in blank, and puts it in the hands of his agents with instructions to fill the blank and deliver it to the obligee or grantee, a conflict of authority arose, which is yet unreconciled. A long line of adjudications (with which the present weight of American authority lies), beginning with the much cited decision of Lord Mansfield in the unreported case of Texeira v. Evans,[6] are authority for the doctrine that such an instrument is valid and binding.[7] On

[1] 1 Shep. Touch., 54.

[2] United States v. Nelson, 2 Brock. 64; Ayres v. Harness, 1 Ohio, 173; Gilbert v. Anthony, 1 Yerg. 69; Perminter v. McDaniel, 1 Hill (S. C.) 267; Lockhart v. Roberts, 3 Bibb. 361; Sigfried v. Swan, 6 S. & R. 308; Duncan v. Hodges, 4 McCord (S. C.). 239; Burns v. Lynde, 6 Allen, 405.

[3] Pence v Arbuckle, 22 Minn. 417.

[4] 1 Yerg., 69.

[5] 2 Brock., 64, citing Markham v. Gonaston, Cro. Eliz. (2 Cro.) 676; s. c., Moore, 547; Zouch v. Clay, 1 Ventr. 185; s. c., 2 Levinz, 35.

[6] Cited in Master v. Miller, 1 Anst. 228.

[7] *Ex parte* Kerwin, 8 Cow. 118; Duncan v. Hodges,

the other hand, a very respectable, if less numerous line of cases, maintains the technical doctrine that a parol authority to fill a blank in a sealed instrument is insufficient, and that a deed so completed after execution is inoperative.[8]

The case of Texeira v. Evans, in which Lord Mansfield laid the foundation of what is to-day the most generally accepted doctrine, was this: "Evans wanted to borrow 400*l*, or so much of it as his credit should be able to raise; for this purpose he executed a bond with blanks for the name and sum, and sent an agent to raise money on the bond. Texeira lent 200*l* on it, and the agent accordingly filled up the blanks with that sum and Texira's name, and delivered the bond to him. On *non est factum* pleaded, Lord Mansfield held it a good deed."[9] This case was fairly duplicated by Van Etta v. Everson,[10] decided by the Supreme Court of Wisconsin in 1871, which is entitled to be considered a leading case among the later decisions on that subject. There the mortgage and note were executed for the purpose of enabling the mortgagor's son to raise money. At the time of execution, they were in blank as to the payee of one and the mortgagee of the other, and these blanks were subsequently filled by the son, who inserted the plaintiff's name in them, upon obtaining the loan from him. It did not appear that the defendant directly or expressly authorized his son to insert the name of plaintiff or of any particular person; his authority to do so, if it existed, must be implied from the facts and circumstances of the execution and delivery of the papers. This implication the court held was fairly raised by such facts.

It is noteworthy that in several cases in which the technical rule prevailed, the courts proceeded with the greatest reluctance, and the decisions were accompanied with expressions of repugnance to the conclusions reached. Said Nisbet, J., in Ingram v. Little:[11] "We put our decision upon authority, conceding that the books in England and in this country are in 'distressing' conflict, and with some misgiving whether reason and common sense do not condemn it." And Chief Justice Marshall, in United States v. Nelson:[12] "I say with much doubt and with a strong belief, that this judgment will be reversed, that the law on this is in my opinion with the defendants."

Some cases reach the same general result as those cited above, by holding that the facts raise an estoppel upon the grantor rather than imply an authority to fill the blanks.

In the Minnesota case of Pence v. Arbuckle,[13] the court, while admitting the existence of the conflict on the subject, invokes the doctrine of estoppel to prevent the grantor in a deed, which was executed and acknowledged, while the date, the name and residences of the parties, the consideration and the description of the land were left blank, from claiming as against an innocent purchaser for value, that it was consequently invalid. Says Gilfillan, C. J.: "The signature and certificate were a continuing representation that the instrument, in whatever condition it might be presented to any one, was in that condition on August 24, 1857. When first shown to Kenkle (the innocent purchaser), there was nothing upon it to raise a suspicion that it was not entirely complete at the date of the acknowledgment. The signature and certifi-

4 McCord (S. C.), 239; Field v. Stagg, 52 Mo. 356; Inhabitants of South Berwick v. Huntress, 53 Me. 89; Van Etta v. Everson, 28 Wis. 37; Vliet v. Camp, 13 Wis. 198; Owen v. Perry, 25 Iowa, 412; Devin v. Himer, 29 Iowa, 299; Clark v. Allen, 34 Iowa, 190; Swartz v. Ballou, 47 Iowa, 188; McNabe v. Young, 81 Ill. 11; Field v. Stagg, 52 Mo. 534. This distinction between the case of the insertion over a signature and seal of an entire instrument, and of the filling of a blank in instrument that has been substantially written before being signed, has been repeatedly recognized. Says 4 Bacon's Abr. 212 (Feofment): "If a blank piece of paper be signed, sealed and delivered, and afterwards an instrument be written over the signature, it is no deed, as there was nothing of substance in it. But a deed executed with blanks and afterwards filled up and delivered by the agent of the party, is good. The blanks must not, however, be filled up after the acknowledgment." See to the same effect Duncan v. Hodges, 4 McCord (S. C.) 239; and also the opinion of Chief Justice Marshall in United States v. Nelson, 2 Brock. 71.

8 Burns v. Lynde, 6 Allen, 405; Upton v. Archer, 41 Cal. 85; Chase v. Palmer, 29 Ill. 309; [see, however, McNab v. Young, 81 Ill. 11]; Hibblewaite v. McMorine, 6 Mees. & W. 200; Ingram v. Little, 14 Ga. 173; Harrison v. Tiernan, 4 Rand. 177; Cross v. State Bank, 5 Ark. 525; Bell v. Quick, 13 N. J. L. 312; Moore v. Bickham, 4 Binn. 1; Powell v. Sheriff of Middlesex, 3 Camp. 181; Markham v. Gonaston, 1 Cro. 626; Week v. Maillardet, 14 East, 568; Boyd v. Boyd, 2 N. & McC. 125.

9 Cited in Master v. Miller, 1 Anst. 228.

10 28 Wis. 37. See, also, Vliet v. Camp, 13 Wis. 198.

11 14 Ga. 182.

12 *Supra.*

13 22 Minn. 417.

cate would naturally cause him to believe, and it is an admitted fact that he did believe the instrument to have been at the date of the certificate, in the same condition as when shown to him. [14]

In other cases the doctrine of estoppel, while not being urged to this length, has tended to put such deeds on the same footing with duly perfected instruments. Where a former owner of lots, who executed a deed for the same, leaving a blank for the grantee's name, when applied to for information as to the title by a party about to purchase the same, of one whose name had been inserted in the deed, disclaimed any title in himself, and stated that the grantee was the owner; and upon this assurance the purchase was made. *Held*, that these facts constitute a complete estoppel in equity on the original owner, and that he could not afterwards claim title. [15]

In Texas the rule is sufficiently peculiar to merit separate attention. There the doctrine prevails that an action of ejectment will be sustained by a merely equitable title; [16] and it has been held that while a deed executed with the name of the grantee in blank is insufficient to convey the title, it is admissible in evidence as a contract of sale, and will take the case out of the statute of frauds in an action for specific performance by the grantee against his grantor. [17] In a later case, that court extends the effect of such a deed, by holding that the grantor is estopped from denying its validity as against a subsequent purchaser for value, without notice of the manner in which the deed was executed. [18] Yet even this falls far short of holding that such a deed is a valid instrument.

In Georgia such a deed, while regarded as inoperative as a muniment of title, has been held admissible to show color of title in the person claiming under it. [19]

Even in the class of cases in which the technical rule is maintained, it must appear, it seems, to affect the validity of the instrument that the blanks and the matter inserted in them, were of such a nature that the act of filling them amounted to a "material alteration." [20]

Actual or implied authority by the grantor or obligor to the person filling the blanks is essential to the validity of the instrument. Therefore it has been held that an instrument in the form of a mortgage, but containing no name of a mortgagee, does not become effectual by being delivered to one who advances money upon the agreement that he shall hold the paper as his security for his loan. [21] And in the case of the conveyance of a married woman the Supreme Court of the United States have held, on the ground of her incapacity to delegate authority, that an instrument in the form of a mortgage of her separate estate, but containing blanks, executed by her, in which the blanks by her husband will not bind even as against one who in good faith, and with knowledge of the mode of execution, lends money on it. [22] No less essential to the validity of the completed instrument than the existence of the authority in the agent to fill the blanks, is it, that such authority should be exercised in strict accordance with the express or implied instructions of the grantor or obligor. If the blanks are filled in an unauthorized way, the deed will be invalidated. [23] Thus, where the plaintiff left with his agent a deed duly executed but with the grantee's name in blank, with instructions that when the purchaser, who was the defendant's sister, should pay the purchase price to fill in her name and deliver the deed to her, and not to deliver it to any other person; but the agent, instead, received the purchase price from defendant, and inserted his name as grantee, the court held that although it might be quite immaterial to the plaintiff, to whom he conveyed the lot so long as he received the purchase price, still he had a right to select his own grantee, such a deed would be void and inoperative, and upon tender by the grantor to the defendant of the amount of the purchase price the court ordered it to be cancelled as a cloud upon plaintiff's title. [24] In that case, too, the ques-

[14] Pence v. Arbuckle, 22 Minn. 420.
[15] Wade v. Bunn, 84 Ill. 117.
[16] Miller v. Alexander, 8 Tex. 36.
[17] McGown v. Wheeler, 20 Tex. 372; Viser v. Rice, 23 Tex. 156.
[18] Ragsdale v. Robinson, 48 Tex. 380.
[19] Ingram v. Little, 14 Ga. 173.
[20] Smith v. Crooker, 5 Mass. 538; Brown v. Pinkham, 18 Pick. 172; Knapp v. Maltby, 13 Wend. 587; State v. Russ, 1 Me. 334. It has been held that the date of an instrument is not material in this sense. White v. Daniel, 1 Hen. & Munf. (Va.) 391.
[21] Chauncey v. Arnold, 24 N. Y. 330.
[22] Drury v. Foster, 2 Wall. 33.
[23] Cooper v. Page, 62 Me. 192.
[24] Schintz v. McManamy, 33 Wis. 299.

tion was raised though not decided, as to what would be the position of the innocent purchaser for value from a person whose name was so inserted as grantee without authority. Elsewhere it has been held that such a grantor is estopped to deny the validity of a deed so executed as against an innocent purchaser for valuable consideration.[25] But where a deed, containing a blank fortha grantee's name was fraudulently and surreptitiously taken from the grantor's house and the blank filled up, it was held that no title passed thereby, but that it was wholly void, and that a *bona fide* purchaser for a valuable consideration from the person holding the deed stood in no better position than auch fraudulent holder, especially if the original grantor remained in the possession of the property.[26]

When once this parol authority to fill blanks has been exercised it is exhausted, and the agent has no right to tamper with the instrument further.[27]

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[25] Swartz v. Ballou, 47 Iowa, 188.
[26] Van Amringer v. Morton, 4 Whar. 382.
[27] *Ex parte* Decker, 6 Cow. 60.

SUPPLYING DANGEROUS GOODS.

The accidents to which workmen are exposed in the course of their work frequently turn on the relation between master and servant, and there were and still are some curious anomalies in that chapter of the law, notwithstanding the Employers Liability Act has removed some of these. But there are rights and duties of workmen not only towards their employers, but towards third parties, and many most important and interesting points arise in the course of redressing injuries and mischances which befall them. In most respects the workman stands towards third parties very much in the same position as his master or employer would do, and therefore the relation of master and servant ceases to be material. But some cases are so mixed and contain so much of both doctrines that it is difficult to disentangle the facts to see which of two diverging principles ought to decide them.

The sale of goods is sometimes complicated with certain qualifications of a similar kind, and raise difficulties whenever the relation of purchaser and seller has been constituted. If a person buys or orders an article for a specific purpose, and the article supplied does not fulfil that purpose, the purchaser has in most cases a remedy under the contract. But there is also, sometimes, a remedy irrespective of the contract on the ground of misrepresentation. This was well illustrated by the remarkable circumstances of the case of Langridge v. Levy.[1] There the plaintiff's father had bought a gun from the defendant for the purpose of being used by the plaintiff, and the defendant represented that it was a safe gun to use. Nevertheless it exploded in the hands of the son, the plaintiff, who was greatly injured thereby, and who sued the defendant for the damage. The court held that though there was no contract between the plaintiff and defendant, yet there was a remedy, on the ground that there was a misrepresentation and damage directly resulting therefrom.

Another class of cases somewhat similar arises out of the relation of landlord and tenant, or rather that relation which exists between a person who is invited to go upon dangerous premises, and not being warned falls into some trap and is injured. Thus two classes of cases are sometimes mixed up together, as they seem to have been in Smith v. London, etc. Dock Co.[2] There the defendants, a dock company, provided a gangway from the shore to the ships lying in their dock, the gangway being made of materials belonging to the defendants, and managed by their own servants. The plaintiff went on board a ship in the dock at the invitation of one of the ship officers, and while he was on board, the defendants' servants, for the purposes of the business of the dock, moved the gangway, so that it was, within their knowledge, insecure. The plaintiff, in ignorance of this insecurity, returned one night along the gangway to the shore, when it gave way and he was injured. The court held that the dock owners were liable, for that the gangway was used by all the people that had occasion to go on and from the ship, and was badly

[1] 4 M. & W. 337.
[2] L. R. 3 C. P. 326.

constructed and placed by the defendants, and was entirely under their control. At the time the accident occurred it was after four o'clock, but it was light and the gates of the dock were not closed, and though under ordinary circumstances the company would not be responsible for the gangway after four o'clock, in this case their servants had been shifting some vessels and undertook the management of the gangway, and therefore there being negligence the defendants were held liable.

Another case somewhat resembling the last was Smith v. Steele.[3] The plaintiff was the executrix of a pilot who was employed to navigate the defendants' ship down the Thames. He was on board giving directions to the crew, and while doing so, a boat which had been negligently slung fell upon him and killed him. The defendants, the owners of the ship, had not personally interfered, but their servants had been negligent in the placing of the boat, and this had directly caused the death. At the trial and afterwards it was contended that the pilot took all such risks on himself, and that it was part of the engagement of a pilot that he should do so. But the court held that there was no such term in the contract between pilot and shipowner. The case fell rather within the rule of Indermaur v. Dames,[4] where Willes, J., laid down the well-known rule to this effect. He said that there was an obligation on the part of the occupier of property, whether fixed or movable, towards those who at his invitation, express or implied, come on that property, to take by himself and servants reasonable care that the person so coming shall not be exposed to unusual danger; and that obligation extended to the workmen sent by a tradesman to repair part of the machinery. Such was also the obligation on the part of a shopkeeper to his customer. It was true there was no such obligation to a servant of the occupier, and the reason was, that the class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. The shipowners were therefore liable for compensation for the death of this pilot.

Such cases as the last two have been followed in many other instances, and are now somewhat familiar, though much difficulty sometimes exists as to whether the person injured on one's premises comes within the category of strangers and workmen or of guests and servants, there being a difference according to the class to which the person belongs. And probably many cases will always turn on this preliminary question of fact.

But there are also difficult points arising out of the class of cases first mentioned, namely, where there is no relation of licensee and occupier of premises, but merely the relation of purchaser and vendor. One remarkable instance occurred in 1869 which is much more curious than that of the gun which exploded in the hands of the purchaser's son. In George v. Skivington,[5] the plaintiffs being husband and wife, sued the defendant, who was a chemist, for damage in compensation of injuries suffered by the wife from using a hair dye. The defendant in the course of his business sold a chemical compound which he professed to be known only to himself, that it was proper for washing the hair, and if used carefully would do no personal injury to the user. The plaintiff bought a bottle of the compound and used it, but it turned out not to be fit for use and injured her health and destroyed her hair. The action was brought accordingly for damages, and it was alleged that the defendant by his unskilfulness and improper representation caused the injury. The defendant demurred to the declaration, contending that it showed no duty on his part and no violation, for that a vendor of an article did not profess to have any skill. The point was argued at some length, and ultimately the Court of Exchequer, consisting of three judges, came to the conclusion that the plaintiffs were entitled to succeed. The case of the gun which burst in the hands of the son of the purchaser was referred to, and it was held to be applicable to this case where the purchaser's wife was equally injured. Kelly, C. B., said that a duty arose on the part of the defendant, knowing, as he did,

[3] L. R. 10 Q. B. 125.
[4] L. R. 2 C. P. 311.
[5] L. R. 5 Ex. 1.

that the article was bought for the purpose of being used as a hair wash, to use due care and skill in compounding a thing fit for that purpose, and suitable to the person for whom it was bought. There was an allegation of carelessness, negligence, and unskilfulness. The judges all agreed. One of the other judges said it would be monstrous to hold that a married woman receiving an injury in this manner could have no remedy for the damage done to her, and that if the injury had been done to the husband he could certainly recover.

This last case has apparently been repudiated, and new views have been thrown out in a very recent case of Heaven v. Pender.[6] That case began in the county court. An action was brought to recover damages for injuries sustained by the plaintiff whilst working in the defendant's dock, and caused by the negligence of the defendants, who were the owners of the docks. The plaintiff was a ship painter, and was employed to paint a ship then lying in the defendants' dock. The shipowner had contracted with one Gray for the painting of his ship while it lay in the dock, and plaintiff was a workman of Gray. The defendants had agreed to supply and erect a staging round the ship for the purpose. Owing to a defect in one of the ropes supplied by the defendants to support the staging, the staging gave way whilst the plaintiff was at work upon it, whereby he was thrown down and severely injured. The rope, when examined after the accident, had the appearance of being burnt at the place where it broke. There was, however, no evidence as to the condition in which the rope was put up, nor that the defendants or their servants knew anything of its defects. The defendants had no control over the plaintiff during the work. An action being brought against the dock-owners, the defendants at the trial contended that there being no privity of contract between the plaintiff or his employer and the defendants, the plaintiff could not recover, because whatever duty arose must be a duty connected with and arising out of some contract. The learned county court judge, however, gave judgment for the plaintiff with damages, the amount of which was agreed upon.

[6] 47 L. T. N. S. 165.

Afterwards a rule was obtained to set aside the judgment and enter the same for the defendants. It was contended that all the authories showed that there must be some contract as a basis for such an action. In the case of Winterbottom v. Wright,[7] the plaintiff was a coachman driving the mail coach, which broke down during the journey. He sued the defendant, who had contracted with the Postmaster-General to supply the coach, while the master of the plaintiff supplied the horses. As no contract existed between the plaintiff and defendant, the court held that no action could be maintained. On the strength of that case the defendants in Heaven v. Pender now contended that no action lay in this case, for the dock-owners had no privity of contract with the painter who was on the staging.

The case being argued, the Queen's Bench Division, consisting of Field, J., and Cave, J., came to the conclusion that the case of George v. Skivington, on which the plaintiff relied, was wrong, and that the other case of Winterbottom v. Wright, which was in conflict with it, was right, and, on the strength of the latter case, they held that as the dock-owners, though supplying the staging, had ceased to have any control over it, they were no longer liable. The defendants had parted with the possession and all control of the staging after making or erecting it, just as completely as a landlord does with property which he has let to a tenant. Here there was no control over the article and no fraud, and, therefore, there was no basis for any liability such as the plaintiff contended for.

Probably this last case may yet be discussed in a court of appeal, but it brings out a conflict between authorities on an important practical point which is to be hoped will be worked out to a conclusion and decided finally so as to guide judges in future in all the like puzzling circumstances.—*Justice of the Peace.*

[7] 10 Mees. & W., 109.

COMMON CARRIER — CONNECTING LINES —RECEIPT OF GOODS FOR A POINT BEYOND LINE OF CARRIER.

MICHIGAN CENTRAL R. CO. v. MYRICK.

United States Supreme Court, January 8, 1883.

1. Among connecting carrier lines the common law duty of each road is only to safely carry over its own route and safely deliver to the next carrier.

2. Each road may, however, extend its liability over the whole route by special contract; but such contract must be proved by clear and satisfactory evidence, and will not be inferred from doubtful expressions or loose language.

3. As far as the route is concerned, the duty of a railroad as a carrier of live animals is the same as its duty as a carrier of goods.

4. The form of receipt in the case at bar construed not to be a contract beyond the end of the line of the carrier giving it.

5. The receipt of goods for a place named beyond the road of the company, the posting of through rates in its depots, and the agreement that the receipt might be exchanged for a through bill of lading, do not prove an assumption of liability beyond its line.

6. What constitutes a contract of carriage is a question of general law in which this court will exercise its own judgment, and will not be bound by State decisions.

In error to the Circuit Court of the United States for the Northern District of Illinois.

This is an action for breach of two alleged contracts of the Michigan Central R. Co. with the plaintiff, Paris Myrick, each to carry for him two hundred and two head of cattle from Chicago to Philadelphia, and there deliver them to his order. It arises out of these facts: Myrick was, in 1877, engaged at Chicago in the business of buying cattle, sometimes on his own account and sometimes for others, and forwarding them by railway to Philadelphia. The company is a corporation erected by the State of Michigan, and its line extends from Chicago to Detroit, where it connects with the Great Western Railroad, which, by its connections, leads to Philadelphia.

In November, 1877, Myrick purchased two lots of cattle, each consisting of two hundred and two head, and shipped them over the road of the company. One of the purchases and shipments was made on the 7th and the other on the 14th of the month. It will suffice to give the particulars of the first of these transactions, as they were identical in all respects, except in the amount of the draft negotiated and the weight of the cattle.

On the shipment of the cattle Myrick took from the company a receipt, as follows:

"MICHIGAN CENTRAL RAILROAD CO.,
Chicago Station, Nov. 7, 1877.

"Received from Paris Myrick, in apparent good order, consigned order Paris Myrick (notify J. and W. Blaker, Philadelphia, Pa.:)

Articles.	Weight or Measure.
Two hundred and two (202) cattle, . .	240,000

"Advance charges, $12.00. Marked and described as above (contents and value otherwise unknown) for transportation by the Michigan Central Railroad Company to the warehouse at ———. "WM. GEAGAN, Agent."

On the margin of the receipt was the following:

"This company will not hold itself responsible for the accuracy of these weights as between buyer and seller, the approximate weight having been ascertained by track-scales, which is sufficiently accurate for freighting purposes, but may not be strictly correct as between buyer and seller. This receipt can be exchanged for a through bill of lading.

"Notice.—See rules of transportation on back hereof. Use separate receipts for each consignment."

On the back of the receipt the rules were printed, one of which, the eleventh, was as follows:

"Goods or property consigned to any place off the company's line of road, or to any point or place beyond the termini, will be sent forward by a carrier or freightman, when there are such, in the usual manner, the company acting for the purpose of delivery to such carrier as the agent of the consignor or consignee, and not as carrier. The company will not be liable or responsible for any loss, damage or injury to the property after the same shall have been sent from any warehouse or station of the company."

On the day this receipt was obtained, Myrick drew and delivered to the Commercial National Bank at Chicago a draft, of which the following is a copy:

"$12,287.57. "Chicago, Nov. 7, 1877.

"Pay to the order of Geo. L. Otis, cashier, twelve thousand two hundred and eighty-seven 87-100 dollars, value received, and charge the same to account of PARIS MYRICK.

"To J. and W. BLAKER, Newtown, Pa."

As security for its payment Myrick indorsed the receipt obtained from the railroad company and delivered it with the draft to the bank, which thereupon gave him the money for it.

The cattle were carried on the road of the Michigan Central to Detroit, and thence over the road of the Great Western Railroad Company to Buffalo, and thence over the roads of other companies to Philadelphia, the last of which was the road of the North Pennsylvania Railroad Company. They arrived in Philadelphia in about four days after their shipment, where, according to the uniform custom in the course of business of the railroad company, they were turned over to the drove-yard company, which was formed for the purpose of receiving cattle arriving there, taking care of them, and delivering them to their owners or consignees. This company notified the Blakers of the arrival of the cattle, and delivered them to those parties without the production of the carrier's receipt, transferred by Myrick to the Commercial National Bank. The Blakers paid the expense of the transportation, took possession

of the cattle, sold them, and appropriated the proceeds. The lot shipped on the 14th of November were delivered in like manner to the Blakers by the drove-yard company without the production of the carrier's receipt given to the bank, and were in like manner disposed of. Soon afterwards the Blakers failed, and the two drafts on them, one made upon the shipment of November 7 and the other on the shipment of November 14, were not paid. Hence the present action for the value of the cattle thus lost to the bank, Myrick suing for its use.

It appeared on the trial that Myrick had made previous shipments of cattle from Chicago to Philadelphia and taken similar receipts from the Michigan Central Railroad Company; that the cattle shipped had always been delivered by the Pennsylvania company at Philadelphia to the drove-yard company there, and by that company delivered to the Blakers without the production of the carrier's receipt or any bill of lading; that the Blakers were dealers in cattle and had particular pens in the yards assigned to them; that the cattle of the shipments of November 7 and November 14 were on their arrival placed by the superintendent of the drove-yards in those pens and were sold by the Blakers on the following day, and that the carrier's receipt was not called for either by the railroad or the stockyard company. It also appeared on the trial that Myrick bought the cattle for the Blakers, and that a person employed by them accompanied the cattle from Chicago until their delivery at the drove yard at Philadelphia; that the through rate from Chicago to Philadelphia on the cattle was fifty-eight cents per hundred; that notice of this rate was posted in the station of the defendant company at Chicago, and that it was not the custom of the railroad company at Philadelphia to look to the consignee for freight, but collected it from the drove yard company.

The court was requested to give to the jury various instructions, one of which, though presented under many forms, amounts substantially to this; that as the road of the Michigan Central Railroad Company terminates at Detroit, the company was not bound, in the absence of special contract, to transport the cattle beyond such termination, and that the receipt of freight for a point beyond and an agreement for a through fare did not of themselves establish such a contract.

The court refused to give this instruction, or any embodying the principle which it expresses. On the contrary, it instructed the jury that the receipt, termed bill of lading, under the circumstances in which it was made, was a through contract, whereby the defendant agreed to transport the cattle named in it from Chicago to Philadelphia and there deliver them to the order of Paris Myrick, and to notify the Blakers of their arrival; that this was the undertaking on the part of the defendant company with the plaintiff Myrick and with any assignee or holder of the contract. The facts attending the transaction not being disputed there could be only one result from this instruction—a recovery by the plaintiff. From the judgment entered thereon the case is brought to this court for review.

George F. Edmunds, for plaintiff in error; *W. C. Larned*, for defendant in error.

FIELD, J., delivered the opinion of the court:

The principal question presented by the instruction requested by the defendant has been elaborately considered and adjudged by this court. It is only necessary, therefore, to state the conclusions reached.

A railroad company is a carrier of goods for the public, and as such is bound to carry safely whatever goods are intrusted to it for transportation within the course of its business to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line, that is, to deliver safely the goods to such line—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the States. As was said in Railroad Co. v. Manufacturing Co.: "It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction." 16 Wall. 324.

This doctrine was approved in the subsequent case of Pratt v. Railroad Co., 22 Wall. 123, although the contract there was to carry through the whole route. Such a contract may, of course, be made with any one of different connecting lines. There is no objection in law to a contract of the kind, with its attendant liabilities. See also Insurance Co. v. Railroad Co., 104 U. S. 157.

The general doctrine, then, as to transportation by connecting lines, approved by this court and also by a majority of the State courts, amounts to this: That each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence. Although a railroad company is not a common carrier of live animals

in the same sense that it is a carrier of goods, its responsibilities being in many respects different, yet when it undertakes generally to carry such freight it assumes, under similar conditions, the same obligations, so far as the route is concerned over which the freight is to be carried.

In the present case the court below held that by its receipt, construed in the light of the circumstances under which it was given, the Michigan Central R. Co. assumed the responsibility of transporting the cattle over the whole route from Chicago to Philadelphia. It did not submit the receipt with evidence of the attendant circumstances to the jury to determine whether such a through contract was made. It ruled that the receipt itself constituted such a contract. In this respect it erred. The receipt does not on its face import any bargain to carry the freight through. It does not say that the freight is to be transported to Philadelphia, or that it was received for transportation there. It only says that it is consigned to the order of Paris Myrick, and that the Blakers at Philadelphia are to be notified. And, after the description of the property, it adds: "Marked and described as above (contents and value otherwise unknown) for transportation by the Michigan Central R. Co. to the warehouse at ——," leaving the place blank. This blank may have been intended for the insertion of some place on the road of the company, or at its termination. It can not be assumed by the court, in the absence of evidence on the point, that it was intended for the place of the final destination of the cattle. On the margin of the receipt is the following: "*Notice.*—See rules of transportation on the back hereof." And among the rules is one declaring that goods consigned to any place off the company's line, or beyond it, would be sent forward by a carrier or freightman, when there are such, in the usual manner, the company acting for that purpose as the agent of the consignor or consignee, and not as carrier; and that the company would not be responsible for any loss, damage or injury to the property after the same shall have been sent from its warehouse or station. Though this rule, brought to the knowledge of the shipper, might not limit the liability imposed by a specific through contract, yet it would tend to rebut any inference of such a contract from the receipt of goods marked for a place beyond the road of the company.

The doctrine invoked by the plaintiff's counsel against the limitation by contract of the common law responsibility of carriers has no application. There is, as already stated, no common law responsibility devolving upon any carrier to transport goods over other than its own lines, and the laws of Illinois restricting the right to limit such responsibility do not, therefore, touch the case. Nor was the common law liability of the defendant corporation enlarged by the fact that a notice of the charges for through transportation was posted in the defendant's station house at Chicago. Such notices are usually found in stations on line which connect with other lines, and they furnish important information to shippers who naturally desire to know what the charges are for through freight as well as for those over a single line. It would be unfortunate if this information could not be given by a public notice in the station of a company without subjecting that company, if freight is taken by it, to responsibility for the manner in which it is carried on intermediate and connecting lines to the end of the route.

Nor was the liability of the company affected by the fact that the notice on the margin of the receipt stated that the ticket might be "exchanged for a through bill of lading." It would seem to indicate that the receipt was not deemed of itself to constitute a through contract. The through bill of lading may also have contained a limitation as to the extent of the route over which the company would undertake to carry the cattle. Besides, if weight is to be given to this notice as characterizing the contract made, it must be taken with the rule to which it also calls attention, that the company assumed responsibility only for transportation over its own line.

It follows from the views expressed that the court below erred in its charge that the ticket or bill of lading was a through contract, whereby the defendant company agreed to transfer the cattle to Philadelphia, and safely deliver them there to the order of Myrick.

Our attention has been called to some decisions of the Supreme Court of Illinois, which would seem to hold that a railroad company which receives goods to carry, marked for a particular destination, though beyond its own line, is *prima facie* bound to carry them to that place and deliver them there; and that an agreement to that effect is implied by the reception of goods thus marked. Illinois Central R. Co. v. Frankenburg, 54 Ill. 88; Same Company v. Johnson, 34 Ill. 389.

Assuming that such is the purport of the decisions, they are not binding upon us. What constitutes a contract of carriage is not a question of local law upon which the decision of a State court must control. It is a matter of general law upon which this court will exercise its own judgment. Chicago City v. Robbins, 2 Black, 429; Railroad Co. v. National Bank, 102 U. S. 14; Hough v. Railway Co., 100 U. S. 213.

If the doctrine of the Supreme Court of Illinois as to what constitutes a contract of carriage over connecting lines of roads is sound, it ought to govern not only in Illinois, but in other States; and yet the tribunals of other States, and a majority of them, hold the reverse of the Illinois court, and coincide with the views of this court. Such is the case in Massachusetts. Nutting v. Railroad Company, 1 Gray, 502; Burroughs v. Railroad Co., 100 Mass. 26. If we are to follow on this subject the ruling of the State courts, we should be obliged to give a different interpretation to the same act—the reception of goods marked for a place beyond the road of the company—in different States, holding it to imply

one thing in Illinois and another in Massachusetts.

The judgment must be reversed, and the case remanded for a new trial; and it is so ordered. Reversed.

RAILROADS — COMMON CARRIERS — MANDAMUS—REFUSAL TO CARRY.

PEOPLE v. NEW YORK CENTRAL, ETC. R. CO.

New York Supreme Court, General Term.

1. A railroad company is compellable by *mandamus* on behalf of the people, represented by their attorney-general, to furnish every requisite facility for carrying passengers and freight, and to carry both in such manner and at such times as the public needs may require.

2. This remedy of the State by *mandamus* is not affected by the fact that injured individuals have their remedy by action for damages occasioned by the failure of the carrier to perform its public duty, and may be resorted to whenever there is a general partial suspension of the duty of receiving and transporting freight, affecting large numbers of people.

3. Railroad corporations can not neglect or refuse to perform their public duties pending a controversy with their employees over the cost and expense of doing them, where it does not appear that the employes committed any unlawful act, or that there was an illegal combination compelling them to stop working.

4. The suit should simply require the corporation to resume the duties of carrier of the goods and property offered for transportation, and upon its return all questions, whether what had been done was sufficient compliance with its command, would become a subject of further consideration.

Appeals from orders of the Special Term, granting motions to quash and dismiss the petition and order to show cause of the appellants and denying the application of the appellants for peremptory writ of mandamus.

Leslie W. Russell, E. C. James, S. Sterne and *D. G. Thompson*, for appellants; *W. D. Shipman* and *R. Conkling*, for respondents.

DAVIS, P. J., delivered the opinion of the court.

The appellants, upon the petition of the Attorney General and affidavits accompanying the same, obtained orders from one of the Justices of this court requiring the respondents respectively to show cause, upon service of less than eight days, at a special term sitting at Chambers, why a peremptory writ of mandamus should not issue commanding the respondents respectively to forthwith resume the discharge of their duties as common carriers and the exercise of their franchises, by promptly receiving, transferring and delivering all such freight or other property as may be offered to or heretofore received by them for transportation at their stations in and to the city of New York, upon the usual and reasonable terms of charge.

Upon an adjourned day for the hearing of the motion, the respondents appeared by counsel, and objected that the moving papers failed to show any grounds for the relief prayed for, and moved to "quash and dismiss said petitions and orders to show cause." The court entertained this motion, and, against the objection of the appellants, awarded the right to open and close the argument on the hearing of the counsel for the respondents; and, after hearing the respective counsel, the court orders as follows: "That the said preliminary objection be and the same is hereby sustained, and the motion to quash and dismiss the said petition and order to show cause be and the same is hereby granted, and the said application of said petitioner denied."

It is now objected that this mode of disposing of the motions was so far irregular as to render the order erroneous. It certainly was an unusual mode of proceeding. The motions came to the Special Term precisely as though upon an ordinary notice. The order of the Judge simply limited the time of notice, and when the respondents appeared in answer to the notice, if they were willing to come to a hearing upon the petition and affidavits, the usual and proper course was to proceed to a hearing of the motions upon those papers, the moving party holding the affirmative and being entitled to the right to open and close. A notice to quash a motion is a novel proceeding. Motions to quash usually apply to existing writ or process, and not to mere attempts to obtain them. The court doubtless regarded the action of the respondent's counsel as in the nature of a demurrer *ore tenus* to the petition and affidavits on the part of the appellants. Where an alternative writ has been granted the defendant may move to quash or set the same aside. People *ex rel.* v. Judges, etc., of Westchester, 4 Cow. 73.

And such a motion is in the nature of a demurrer (People v. College of Physicians, 7 How. Pr. 290), and should be made the return to the writ, unless the motion to quash is based upon a defect in substance, in which case it may be taken advantage of at any time before a peremptory mandamus is awarded. Commercial Bank v. Canal Commissioners, 10 Wend. 31; The People v. Ransom, 2 N. Y. 492.

Of course upon such a motion, the moving party holds the affirmative. But that was not this case. In this case no alternative writ having been issued, there was nothing to quash, and the objection was simply an assertion that the appellants were not, upon their own showing, entitled to have the motion granted, and such assertion did not change the rights of the respective parties as to the order of proceeding on the hearing. The Court of Appeals have held that the according of the affirmative to the wrong party on a trial before a jury, is an error fatal to the judgment. But on motions at Special Term, it is not very material which party opens or closes; and this court on review will only inquire into the correctness of the decision, where the order denies or grants the motion. In this case, although the order directs that the petition and proceedings be quashed,

yet the motion for the mandamus was also denied, and both the denial and the order to quash were based upon the merits of the motion. The right of appeal was not affected, and we think it is our duty to hear and dispose of the appeal upon the merits. The practice at the Special Term should, however, be discountenanced as a precedent.

The question presented by the motion is one of signal importance. It is whether the people of the State can invoke the power of the courts to compel the exercise by railroad corporations of the most useful public functions with which they are clothed. If the people have that right, there can be no doubt that their Attorney-General is the proper officer to set it in effective operation on their behalf. 1 R. S. 179, sec. 1; Code of Civil Procedure, sec. 1993; People v. Halsey, 37 N. Y. 344; People v. Collins, 19 Wend. 56. The question involves a consideration of the nature of this class of corporations, the objects for which they are created, the powers conferred and the duties imposed upon them by the laws of their creation and of the State. As bodies corporate, their ownership may be and usually is altogether private, belonging to the holders of their capital stock, and their management may be vested in such officers or agents as the stockholders and directors, under the provisions of law, may appoint. In this sense they are to be regarded as trading or private corporations, having in view the profit or advantage of the corporators. But these conditions are in no just sense in conflict with their obligations and duties to the public. The objects of their creation are from their very nature largely different from those of ordinary private and trading corporations. Railroads are in every essential quality public highways, created for public use, but permitted to be owned, controlled and managed by private persons. But for this quality the railroads of the respondent could not lawfully exist. Their construction depended upon the exercise of the right of eminent domain which belongs to the State in its corporate capacity alone, and can not be conferred except upon a "public use."

The State has no power to grant the right of eminent domain to any corporation or person for other than a public use. Every attempt to go beyond that is void by the Constitution, and, although the legislature may determine what is a necessary public use, it can not by any sort of enactment divest of that character any portion of the right of eminent domain which it may confer. This characteristic of "public use" is in no sense lost or diminished by the fact that the use of the railroad by the corporation which constructs or owns it must from its nature be exclusive. That incident grows out of the method of use which does not admit of any enjoyment in common by the public. The general and popular use of a railroad as a highway is therefore handed over exclusively to corporate management and control, because that is for the best and manifest advantage of the public. The progress of science and skill has shown that highways may be created for public use, of such form and kind that the best and most advantageous enjoyment by the public can only be secured through the ownership, management and control of corporate bodies created for that purpose, and the people of the State are not restricted from availing themselves of the best modes for the carriage of their persons and property. There is nothing in the Constitution hostile to the adoption and use by the State of any and every newly developed form or kind of travel and traffick which have a public use for their end and aim, and giving to them vital activity by the use of the power of eminent domain.

When the earliest Constitution of our State was adopted railroads were unknown. The public highways of the State were its turnpikes, ordinary roads and navigable waters. The exercise of eminent domain in respect of them was permitted by the Constitution for the same reasons that adapt it now to the greatly improved methods of travel and transportation; and in making this adaptation there is no enlarged sense given to the language of the Constitution, so long as its inherent purpose—the creation only of public uses—be faithfully observed.

These principles are abundantly sustained by authority. In Bloodgood v. Mohawk, etc. R. Co., (18 Wend. 9), the court of last resort in this State first announced then and affixed to railroads their true character as public highways. It is there declared that the fact that railroad corporations may remunerate themselves by tolls and fares "does not destroy the public nature of a road, nor convert it from a public to a private use. * * * If it is a public franchise, and granted to the company for the purpose of providing a mode of public conveyance, the company, in accepting it, engages it on its part to use it in such manner as will accomplish the object for which the legislature designed it." And in Olcott v. Supervisors (16 Wall. 678), the Supreme Court of the United States adjudged "that railroads, though constructed by private corporations, and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question was whether a State's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for private use. Yet it is a doctrine universally accepted that a State legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one, is that such a

road is a highway, whether made by the Government itself or by the agency of corporate bodies, or even by individuals when they obtain their power to construct it from legislative grant. Whether the use of a railroad is a public or a private one, depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State. Though the ownership is private, the use is public. The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used. That all persons may not put their own cars upon the road, and use their own motor power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge."

All public highways are subjects of general State jurisdiction, because their uses are the common property of the public. This principle of the common law is, in this State, of universal application. As to the class of public highways known as railroads, the common law is fortified by the express conditions of the statutes creating or regulating or controlling them.

The general railroad act of this State may now be regarded as the general charter of all such corporations. It authorizes the organization of corporations for "the constructing, maintaining and operating of railroads "for public use," and it imposes upon them the duty to "furnish accommodations for all passengers and property, and to transport all persons and property on payment of fare and freight." Laws of 1850, chap. 10, sec. 1 and sec. 33.

These words are a brief summary in respect of the duties imposed upon such corporations by all the provisions of the act. Those duties are consigned to them as public trusts, and, as was said in Messenger v. Pennsylvania R. Co. (36 N. J. 417): "Although in the hands of a private corporation, they are still sovereign franchises, and must be used and treated as such; they must be held in trust for the public good." This relation of such a corporation to the State is forcibly expressed by Emmons, J., in Tallcott v. Township of Pine Grove. 1 Flippin, U. S. C. C. 144. "The road once constructed is, instanter and by mere force of the grant and law, embodied in the governmental agencies of the State, and dedicated to public use. All and singular its cars, engines, rights of way and property of every description, real, personal and mixed, are but a trust fund for the political power, like the functions of a public office. The artificial personage—the corporation created by the sovereign power expressly for this sole purpose and no other—is, in the most strict, technical and unqualified sense, but its trustee. This is the primary and sole legal, political motive for its creation. The incidental interest and profits of individuals are accidents, both in theory and practice."

The acceptance of such trusts on the part of a corporation by the express and implied contracts already referred to, makes it an agency of the State to perform public functions which might otherwise be devolved upon public officers. The maintenance and control of most other classes of public highways are so devolved, and the performance of every official duty in respect of them may be compelled by the courts on application of the State, while private damages may also be recoverable for individual injuries. The analogy between such officials and railroad corporations in regard to their relations to the State is strong and clear, and, so far as affects the construction and proper and efficient maintenance of their railroad, will be questioned by no one. It is equally clear, we think, in regard to their duty as carriers of persons and property. This springs sharply out of the exclusive nature of their right to do these things. On other public highways, every person may be his own carrier, or he may hire whomsoever he will to do that service. Between him and such employee a special and personal relation exists independent of any public duty, and in which the State has no interest. In such a case the carrier has not contracted with the State to assume the duty as a public trust, nor taken power to do it from the State by becoming the special donee and depository of a trust. A good reason may therefore be assigned why the State will not by *mandamus* enforce the performance of his contract by such a carrier. But the reason for such a rule altogether fails when the public highway is the exclusive property of a body corporate which alone has power to use it, in a manner which of necessity requires that all management, control and user for the purposes of carriage, must be limited to itself, and which, as a condition of the franchise that grants such absolute and exclusive power over a user of a public highway, has contracted with the State to accept the duty of carrying all persons and property within the scope of its charter as a public trust. The relation of the State to such a body is entirely different from that which it bears to the individual users of a common highway, as between whom and the State no relation of trust exists, and there is small reason for seeking analogies between them.

It is the duty of the State to make and maintain public highways. That duty it performs by a scheme of laws which set in operation the functions of its political divisions into counties, towns and other municipalities, and their officers. It can, and does, enforce those duties, whenever necessary, through its courts. It is not the duty of the State to be, or become, a common carrier upon its public highways; but it may in some cases assume that duty, and whenever it lawfully does so, the execution of the duty may be enforced against the agents or officers upon whom the law devolves it. It may grant its power to

construct a public highway to a corporation or an individual, and, with that power, its right of eminent domain, in order to secure the public use; and may make the traffic of the highway common to all on such terms as it may impose. In such case it is its duty to secure that common traffic, when refused, by the authority of its courts. 19 Wend. 56; 1 Cow. 23. Or it may grant the same powers of construction and maintenance with the exclusive enjoyment of use, which the manner of use requires, and if that excludes all common travel and transportation, it may impose on the corporation or person the duty to furnish every requisite facility for carrying passengers and freight, and to carry both in such manner and at such times as public needs may require. Why is that duty in respect of the power to compel its performance through the courts, not in the category of all others entrusted to such a body?

The writ of *mandamus* has been awarded to compel the company to operate its railroad as one continuous line (Railroad Co. v. Hall, 91 U. S. 343); to compel the running of passenger trains to the terminus of the road (State v. Railroad Co., 29 Conn. 538); to compel it to construct and maintain fences and cattle guards (People v. Railroad Co., 14 Hun, 371; 76 N. Y. 284); to compel it to build a bridge (People v. Railroad Co., 70 N. Y. 569); to compel it to construct its road across streams so as not to interfere with navigation (State v. Railroad Co., 9 Richardson, 247); to compel the company to run daily trains (*Re* New Brunswick & Canada R. Co., 1 P. & B. New Brunswick, 67); to compel the delivery of grain at a particular elevator (Railroad Co. v. People, 56 Ill. 365); to compel the completion of its road (Trust Co.v.Railroad Co.,17 Am. L. Reg. 266); to compel the grading of its track so as to make crossings convenient and useful (58 N. Y. 152; 12 Hun, 175; 71 N. Y. 302; Indianapolis R. Co. v. State, 37 Ind. 489; 35 N. J. L. 396); to compel the re-establishment of an abandoned station (State v. Railroad Co., 37 Conn. 154); to compel the replacement of a track taken up in violation of its charter (King v. Railway Co., 2 Barn. & Adol. 644); to prevent the abandonment of a road once completed (Talcott v. Pine Grove, *supra*, 1 Flippin, 145); and to compel a company to exercise its franchise. People v. A. V. R. Co., 24 N. Y. 261. These are all express or implied obligations arising from the charters of the railroad companies, but not more so than the duty to carry freight and passengers. That duty is, indeed, the *ultima ratio* of their existence, the great and sole public good, for the attainment and accomplishment of which all the other powers and duties are given or imposed. It is strangely illogical to assert that the State, through the courts, may compel the performance of every step necessary to bring a corporation into a condition of readiness to do the very thing for which it is created, but it is then powerless to compel the doing of the thing itself.

We can not bring our minds to entertain a doubt that a railroad corporation is compellable by *mandamus* to exercise its duties as a carrier of freight and passengers, and that the power so to compel it rests equally firmly on the ground that that duty is a public trust, which, having been conferred by the State and accepted by the corporation, may be enforced for the public benefit, and also upon the contract between the corporation and the State expressed in its charter or implied by the acceptance of the franchise (Abbott v. Johnson R. Co., 80 N. Y. 31), and also upon the ground that the common right of all the people to travel and carry upon every public highway of the State has been changed by the Legislature, for adequate reasons, in this special instance, into a corporate franchise to be exercised solely by a corporate body for the public benefit, to the exclusion of all other persons, whereby it has become the duty of the State to see to it that the franchise so put in trust be faithfully administered by its trustee.

But it is said that the State is not injured and has no interest in the question whether the corporation perform the duty or not. The State may suffer no direct pecuniary injury, as it may not by the neglect of one or more of its numerous political officers who hold in trust for the people the official duties reposed in their hands; but that is no test of the power or duty of the State in either case. The sovereignty of the State is injured whenever any public function vested by it in any person, natural or artificial, for the public good, is not used or is misused, or is abused; and it is not bound to inquire whether some one or more of its citizens has not thereby received a special injury for which he may recover damages in his private suit. Such an injury wounds the sovereignty of the State and thereby, in a legal sense, injures the entire body politic.

The State in such a case as this has no other adequate remedy. It may proceed, it is true, to annul the corporation, as has been held in many cases where corporations have neglected public duties (People v. Fishkill R. Co., 27 Barb. 452, 458; People v. H. & C. Turnpike Co., 23 Wend. 254; Turnpike Co. v. State, 3 Wall. 210; People v. K. & N. Turnpike Co., 23 Wend. 208; People v. B. & B. Turnpike Co., Id. 222; C. R. Bridge Co. v. Warren Bridge, 7 Pick. 344); but that remedy is not adequate, for it only destroys functions where the public interests require their continued existence and enforcement. It has, therefore, an election which of these remedies to pursue. State v. Railroad Co., 29 Conn. 538; People v. Railroad Co., 24 N. Y. 261; Talcott v. Pine Grove, *supra*.

Undoubtedly a sound discretion is vested in its law officer to decide whether the exigency is such as to call for the use of either remedy, as it is ultimately for the court to judge whether the elected remedy should be applied. But upon the question of power and of sufficient legal injury to justify its use where the corporation neglects or refuses to exercise its franchises or perform its duties, there seems to us no reason of doubt.

Nor do we think the fact that injured individ-

uals may have private remedies for the damages they may have sustained by neglect of duties, preclude the State from its remedy by mandamus. Where the injury is to a single person under circumstances which do not affect the general public, the courts in the exercise of their discretion have properly refused this remedy on his relation. He has an adequate remedy by private action for damages. That was the case of Ohlen v. Erie R. Co. (22 Hun, 533), relied upon by the court below, that the relator's remedy was by suit for damages and not by mandamus. That case is not authority for denying the writ to the Attorney General for a neglect or refusal by corporations to exercise their franchises to an extent which affects great numbers of citizens and continues to for a considerable period of time; nor does it deny the right of the people acting on their own behalf and in their own suit, to pursue the remedy in any case of neglect or refusal to exercise a public function which the interests of the people require should be kept in vigorous and efficient use. The court in that case recognizes the distinction when it says: "An exception exists * * * where a corporation suspends the exercise of its functions." The suspension of the exercise of corporate functions is the gravamen of the complaint in this case, and the case cited is no authority for denying the writ when the people come into court with their own suit by their Attorney-General to move for a writ of mandamus on allegations of an alleged long-continued and very general suspension of a corporate duty.

It was supposed by the court below that the provisions of section 28 of the act of 1850, as amended by chapter 133 of the Laws of 1880, which provide that railroad corporations shall have power "to regulate the time and manner in which passengers and property shall be transported," interfere in some way with the power to grant the writ. Undoubtedly it gives the discretion which the learned judge states, but it can not be so construed as to justify a general or partial suspension of the duty of receiving and transporting freight. Language of that kind in a similar act was correctly construed by Dickerson, J., in Railroad Owners v. Portland, etc. R. Co., 63 Me. 269. We adopt but have not room to quote his language.

Having determined the question of the right of the State to prosecute the writ of mandamus on the ground of refusal or neglect of a corporation to exercise its duty of carrier, it remains to be seen whether a case which would justify the granting of the writ, was presented. The case stands altogether upon the facts presented by the appellants. The course taken by the respondents must be regarded as an admission of the material facts contained in the petition and affidavits.

The petition alleges that the said railroad company, since about the 16th day of June, 1882, has substantially refused to discharge its duties as a common carrier, and has to a material degree suspended the exercises of its franchises by refusing to take freight which has been offered at its stations in the City of New York for transportation, at the usual rates and upon the usual terms, and that said railroad company has refused to accept and transport the greater part of the outgoing and to deliver the incoming freight and property of the merchants doing business in the City of New York, who have relations with and need for the services of such railway, and has refused to them to furnish adequate transportation for the same, so that from the date aforesaid until the present date the business community of the City of New York are unable to obtain sufficient and adequate transportation for their goods on said railroad, although they have offered the same on the usual terms and rates of transportation; but said railroad has uniformly delayed, and sometimes peremptorily refused, to receive and deliver freight and to transport the outgoing freight as aforesaid, and at certain points within the State has declined to receive incoming freight, whereby great loss and damage accrue to the people of the State of New York, for which there is no adequate remedy in damages, and that the trade and commerce of said city is greatly injured by the action of the said railroad.

These allegations are broad enough to show a quite general and largely injurious refusal and neglect to perform the duties of carrier. The affidavits go far to sustain these allegations; but it is not important to examine them minutely, because the admission of a demurrer *ore tenus* extends to and limits the well-pleaded averments of the petition. Stated very briefly, the affidavits show that for about two weeks the respondents failed and neglected to receive from three-quarters to seven-eighths of the goods for transportation from the city, and large quantities seeking tranportation to the city, and in many instances refused to receive goods offered, and turned them back and closed their gates during business hours, thus causing a stoppage of all delivery of freight; that in some instances unusual terms were sought to be imposed as a condition of receiving goods, which would increase the risks of the owner; that the refusal to receive goods did not arise from any unwillingness or inability on the part of the shipper to pay charges, but was wholly the act of respondents; that it was so continued and extensive that it seriously interfered with the business operations of the citizens of New York, deteriorated the value of many commodities, and caused a diversion of trade from the city and great losses were caused, and especially that large quantities of perishable goods by reason of nondelivery were destroyed, to the value of many thousand dollars; that a vast amount of freight, equal, as estimated, to 360,000 tons, was thus detained or refused carriage; that large numbers of carmen were detained in their efforts to deliver freight, and the injury to that branch of business is estimated at not less than $50,000, while the aggregate of injuries are estimated at some millions. These are the substantial facts conceded

by the respondents at the Special Term. Surely it can not be doubted that these facts being true and unexcused show a strong case for the interference of the State.

The only question is whether the course and conduct of the respondents was so far excused by anything appearing in the petition and affidavits that the court was justified in denying the motion for the writ on its own motion, or in a wise exercise of its judicial discretion.

The excuse appears only in the statements of the reasons assigned by the respondents for their refusal to accept, transport and deliver the freight and property. In the petition it is in these words: "That the persons in their employ handling such freight refused to perform their work unless some small advance, said to be three cents per hour, is paid them by the said railroad corporation." The affidavits show, it may in short be said, that the skilled freight handlers of the respondents, who had been working at the rate of seventeen cents per hour (or one dollar and seventy cents for ten hours), refused to work unless twenty cents per hour (or two dollars per day of ten hours) were paid, and that their abandonment of the work, and the inefficiency of the unskilled men afterwards employed, caused the neglect and refusal complained of.

It is not alleged or shown that the workmen committed any unlawful act, and no violence, no riot, and no unlawful interference with other employees of the respondents appears. It is urged in effect, that the court should regard the cases as unlawful duress caused by some breach of law sufficiently violent to prevent the reception and transportation of freight. There is nothing in the papers to justify this contention. According to the statement of the case, a body of laborers acting in concert fixed a price for their labor and refused to work at a less price. The respondents fixed a price for the same labor and refused to pay more. In doing this neither did an act violative of any law or subjecting either to any penalty. The respondents had a lawful right to take their ground in respect of the price to be paid and adhere to it if they chose, but if the consequence of their doing so were an inability to exercise their corporate franchises to the great injury of the public they can not be heard to assert that such consequence must be shouldered and borne by an innocent public, who neither directly nor indirectly participated in their causes.

If it had been shown that a "strike" of their skilled laborers had been caused or compelled by some illegal combination or organized body which held an unlawful control of their actions, and sought through them to enforce its will upon the respondents, and that the respondents in resisting such unlawful efforts had refused to obey unjust and illegal dictation and had used all the means in their power to employ other men in sufficient numbers to do the work, and that the refusal and neglect complained of had grown out of such a state of facts, a very different case for the exercise of the discretion of the court, as well as of the attorney-general, would have been presented. Whether such a state of facts could have been shown we can not judicially know. The present case must stand or fall upon the papers before us, and we are not to be swerved from thus disposing of it by any suggestion of facts not in the case, which might lead, if they appeared, to some other result. The most that can be found from the petition and affidavits is that the skilled freight handlers of the respondents refuse to work without an increase of wages, to the amount of three cents per hour; that the respondents refuse to pay such increase; that the laborers then abandoned the work, and that the respondents did not procure other laborers competent or sufficient in number to do the work. And so the numerous evils complained of fell upon the public, and were continuous until the people felt called upon to step in and seek to remedy them by proceedings for *mandamus*.

These facts reduce the question to this: Can railroad corporations refuse or neglect to perform their public duties upon a controversy with their employees over the cost or expense of doing them? We think this question admits of but one answer. The excuse has in law no validity. The duties imposed must be discharged at whatever cost. They can not be laid down or abandoned or suspended without the legally expressed consent of the State. The trusts are active, potential and imperative, and must be executed until lawfully surrendered, otherwise a public highway of great utility is closed or obstructed without any process recognized by law. This is something no public officer charged with the same trusts and duties in regard to other public highways can do without subjecting himself to *mandamus* or indictment.

We are not able to perceive the difficulties that embarrassed the court below as to the form of a writ of *mandamus* in such cases. It is true the writ must be specific as to the thing to be done; but the thing to be done in this case was to assume the duties of carriers of the goods and property offered for transportation. That is, to receive, carry and deliver the same under the existing rules and regulations as the business had been accustomed to be done. There was no necessity to specify what kinds of goods should be first received or carried, or whose goods, or indeed to take any notice of the details of the established usages of the companies. It was the people who were invoking the writ, on their own behalf, and not for some private suitor, or to redress individual injuries. The prayer of the petition indicated the proper form of the writ. Upon the return to the writ all questions whether what has been done is a sufficient compliance with its command may properly arise and become a subject of further consideration. They need not have been anticipated.

It is suggested that the time has now passed when such a writ can be of any valuable effect. That is probably so, but we are governed by the

record in disposing of the appeal, and not by subsequently occurring events. The appellants labor now under a judgment alleged to be injurious to the rights they possessed when it was pronounced, and harmful to them as a precedent. If erroneous, they are entitled to have that judgment reversed, and to be indemnified in the discretion of the court for the costs incurred on the appeal made necessary by the error.

We think the court below had power to award the writ, and that upon the case presented it was error to refuse it.

The order should be reversed with the usual costs, and an order entered, if deemed advisable from any existing circumstances by the attorney-general, awarding the writ.

WEEKLY DIGEST OF RECENT CASES.

1. ALTERATION—PAYMENT OF ALTERED CHECK.

The plaintiff, a depositor with defendant, intending to leave town, drew a check on April 20, payable to the order of A, his clerk, dating it the 22d, with instructions that if he did not return on that day A should then draw the money and give it to plaintiff's foreman, for the purpose of paying workmen. On the 21st A altered the check by erasure so that the date read April 21, indorsed it, presented it to the defendant, who paid him its amount. A absconded with the money. In this action to recover the sum named in the check, *Held*, that such amount should not have been charged against the plaintiff. The taking of the check afterwards by plaintiff for the purpose of prosecuting A did not ratify the alteration or estop him from bringing this action. *Crawford v. West Side Bank*, N. Y. Superior Court; 23 Daily Reg. 321.

2. CONFLICT OF LAWS—BILL OF EXCHANGE—LAW OF PLACE OF PAYMENT.

1. The law of the place where a foreign bill of exchange is payable governs as to the time and manner of its presentation and mode of its protest. 2. Under the statutes of Minnesota the law of a foreign country may be proved by the testimony of a lawyer of that country. *Pierce v. Indseth*, U. S. S. C., January 8, 1883: 5 Morr. Trans. 564.

3. CRIMINAL LAW—ESCAPE PENDING APPEAL—DISMISSAL OF APPEAL.

1. It being shown by affidavit of the jailer of Muscogee county that the plaintiffs in error have escaped from the jail of said county since their conviction, and have not surrendered themselves, being still at large, they can not be heard to urge in this court error in their trial in the court below. 2. When this case was called and motion made to dismiss, we retained it on the docket, and it has been kept there until the end of the term to which it was brought, thus giving defendants ample time to surrender themselves and submit to the judgment of the court; and the end of the term being reached without such submission and surrender, the case must be dismissed. *Madden v. State*, S. C. Ga., Feb. 13, 1883.

4. DEED — COVENANT OF WARRANTY — INCUMBRANCE.

Defendant sold and conveyed a part of a lot, reserving a stairway, which was to be built and used in common between the building erected on his part of the lot and the part conveyed. Afterwards he became the owner of the adjoining building, and conveyed it by warranty deed to plaintiff, who brought an action for breach of defendant's covenant against incumbrances. *Held*, that the right to use the stairway in common was an easement and an incumbrance, and that defendant was liable. The deed and agreement by which the reservation was made were properly introduced in evidence under the pleadings, to show the existence of the easement or incumbrance complained of. As the stairway was the means of access to the whole of the second and third floors, it was not error to allow plaintiff to prove damages to the whole building. The fact that the plaintiff knew of the existence of the stairway at the time of the purchase of the property, can not affect his right to recover for the breach of covenant. *McGowen v. Myers*, S. C. Iowa, Dec. 12, 1882; 14 N. W. R., 788.

5. DIVORCE—INHUMAN AND CRUEL TREATMENT.

Evidence that a husband is subject to violent fits of anger; that at one time he threw a satchel filled with groceries against his wife; at another time raised a hammer over her head and threatened to strike her, and at another time searched through the house for a revolver and threatened to kill her—is sufficient to make out a case of inhuman treatment that will entitle the wife to a divorce. *Sackrider v. Sackrider*, S. C. Iowa, Jan. 18, 1883; 14 N. W. R., 736.

6. EVIDENCE—COMMUNICATIONS WITH COUNSEL—PRIVILEGE.

Mere statements made in the presence of counsel, but not made to him, are not privileged communications. *Shaffer v. Mink*, S. C. Iowa, Jan. 16, 1883; 14 N. W. R., 726.

7. FRAUDULENT CONVEYANCES—GOOD FAITH OF GRANTEE.

Where a party purchases property in good faith, and for value, his title is not affected by any intent of the grantors to defraud their creditors by the sale. *Spring Lake Ins. Co. v. Waters*, S. C. Mich., Jan. 17, 1883; 14 N. W. R., 679.

8. HOMESTEAD — CONTINUANCE OF THE EXEMPTION.

1. The setting apart of a homestead or the allowance of an exemption does not alter or change, or in any manner affect the title to the property exempted—it simply sets it apart to a particular specified use, and to that extent imposes a charge or incumbrance upon the estate, and when the family is broken up, either by the death of the dependent member, or the coming of age of sons—in case they are otherwise *sui juris*, the property becomes disencumbered, and is liable to the debts of the owner of the legal title; the use is then fully executed and is at an end. 2. In the case of dependent females for whose benefit, wholly or partially, the exemption was taken, the homestead right continues so long as one of them lives and remains single. Nor is it necessary that they should be the daughters of the head of the family, but only that they were of the family for whose

benefit the exemption was taken. *Gresham v. Johnson*, S. C. Ga., Feb. 13, 1883.

9. MUNICIPAL BONDS—PUBLIC PURPOSE - ILLEGAL CONTRACT—ESTOPPEL.

1. The act of the legislature of West Virginia, passed December 15, 1868, (ch. 118), authorizing the city of Parkersburg to issue its bonds for the purpose of lending the same to persons engaged in manufacturing, was invalid, and the bonds issued under it are void as against the city. 2. As the consideration for bonds to the amount of $20,000 issued by the city to M under said act, he executed to J, as trustee, a deed conveying to J certain real estate and personal property, in trust to secure the payment by M to the city of semi-annual interest on $20,000, and of annual instalments on the principal, with a power of sale in case of default. The bonds were payable to M or order. He indorsed them in blank and sold them to the plaintiffs, who bought them for value, in good faith. M paid to the city one instalment of interest. The city made five payments of interest on the bonds. It took into its possession the property and refused to make further payments of interest. In a suit in equity brought by the holders of the bonds against the city: *Held*, 1. The bonds were void because the necessary amount to pay the principal and interest of them was to be raised by taxation, and such taxation was not taxation for public object, and the Constitution of the State did not authorize such taxation, and the legislature had no power to pass said act. The payment of interest on the bonds by the city did not, nor did the acts of its officers or agents in dealing with the property, operate, by way of estoppel or ratification, to make the city liable on the bonds, there having been a total want of power to issue them originally 2. The bill having prayed for a receiver of the property, but none having been applied for, and the suit not having been brought to a hearing for nearly three years, and the city having been allowed to control and manage the property meantime, and M being a party to the suit and making no defense, and the city having acted in good faith and with reasonable discretion in taking care of the property and disposing of some of it, the receipt of the property by the city did not create an obligation on its part to pay the bonds. 4. M had a right to reclaim the property and to call on the city to account for it, in disaffirmance of the illegal contract, the transaction being merely *malum prohibitum*, and the city being the principal offender. Such right passed to the plaintiffs as an incident to the bonds. 5. A decree was ordered declaring that the city, in issuing the bonds, exceeded its lawful powers, and they can not be enforced as obligations of the city, and providing for a sale of the remaining property, and the taking of an account between the city and the property, crediting the city with the sums it had paid in good faith to acquire, protect, preserve and dispose of the property, and for insurance and taxes, and the amount it had paid in paying the coupons it had paid, and charging it with what it had received, but not charging it with any sum for loss of, or damage to, or depreciation of the property, and the distribution among the plaintiffs of the net proceeds of the sale and the net amount of money, if any, remaining in the hands of the city, received from M, or from the sales by it of any of the property received by it. *City of Parkersburg v. Brown*, U. S. S. C., January 8. 1883; 5 Morr. Trans. 534.

10. MUNICIPAL CORPORATIONS—POWER OF BOARD OF LEVEE COMMISSIONERS TO MAKE CONTRACTS.

1. A board of commissioners, one from each of five counties, having been incorporated by a State statute to construct and maintain levees, with authority to make contracts for the doing of the work, and having made such a contract, and been sued in equity thereon, in the district in which the domicil of the board was established by its act of incorporation, by persons residing out of the district, a subsequent statute of the State abolished the offices of the commissioners, and constituted the treasurer and the auditor of accounts of the State *ex officio* the levee board, with the declared purpose "to substitute the treasurer and auditor in place of the board of levee commissioners now in office;" and a bill of revivor was filed against them by leave of the court: *Held*, that the suit might be prosecuted against the new board, although both the treasurer and the auditor resided out of the district; and that an appeal from a final decree for the plaintiff might be taken by the treasurer and auditor, describing themselves by their individual names, and as such officers and as *ex officio* the levee board. 2. A board of commissioners authorized by statute to make contracts for the building of levees, and to borrow money, issue bonds and sell and negotiate them in any market, but not at a greater rate of discount than ten per cent., may make a contract for the work at certain prices by the cubic yard, payable in such bonds; and may afterwards amend that contract by inserting "at the rate of ninety cents on the dollar," and issue bonds to the contractors accordingly, upon being satisfied that such was the agreement actually made between the parties, although the work is actually done by sub contractors for lower prices in cash. 3. A board of levee commissioners made a settlement with contractors employed to do the work on certain levees, by which it paid them a certain sum and took a receipt in full of all demands. The parties afterwards executed an agreement under seal reciting the settlement and receipt in full of all demands, a complaint of the contractors that injustice had been done them in that settlement, and the desire of the board to do full justice, and stipulating that two engineers, one designated by each party, should measure the work done and render to the parties an estimate of the amount due to the contractors for such work according to the original contract; that if this should differ from the amount already paid, the difference should be paid or refunded accordingly; and that these two engineers and a third to be agreed on by them should be arbitrators for the adjustment of all questions of difference; that in the adjustment of questions pertaining to the measurement, the contractors should have the privilege of introducing all proper evidence and the board of rebutting that evidence; and that before proceeding with the measurement the contractors should give written notice to the board of the points to be proved and the character of the evidence to be offered. The contractors thereupon gave notice of their intention to introduce proof of several matters, some of which did not concern the measurement, to which the engineer of the board objected, and the arbitration fell through: *Held*, that the settlement and receipt bound the contractors as an accord and satisfaction, and they could not maintain a suit upon the original contract to recover further compensation for the work. *Hem-*

ingway v. Stansel, U. S. S. C., Jan. 8, 1883; 5 Morr. Trans., 554.

11. PARENT AND CHILD—SON'S SERVICES — CONTRACT.
A son who, at the request of his father, works a farm and cares for the father and mother under promise that he shall receive pay for his services, and shall have the farm at his father's death, may recover the full value of such services where the father makes no disposition of the farm whereby it becomes the property of the son. *In re Dickerson's Estate*, S. C. Mich., January 17, 1883; 14 N. W. R. 691.

12. RAILROAD MORTGAGE—APPEAL—FORECLOSURE—STATE LIEN FOR TAXES.
In a foreclosure suit pending in the circuit court, the mortgage property being in the hands of its receivers, the State of Georgia presented a petition in which, declining to become a party to the suit, it asked that the receivers be required to withdraw from the possession of a part of the property in their hands, upon some of which execution for State taxes had been levied prior to their appointment. The petition was denied and dismissed: *Held*, that the action of the court could not be reviewed upon the appeal of the State, for the reason, if there were no others, that the order did not conclude any right it had in virtue of the executions, or of the levies made thereunder. *State v. Jesup*, U. S. S. C., Dec 18, 1882; 5 Morr. Trans. 527.

13. SEAL—OFFICIAL SEAL OF PUBLIC OFFICER.
The impress of a seal of a public officer on the paper itself, although not on wax or some similar substance, is, in the absence of positive law forbidding it, a sufficient authentication of his official act, if it can be identified on inspection. *Pierce v. Indseth*, U. S. S. C., Jan. 8, 1883; 5 Morr. Trans., 564.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

20. A promissory note payable to B, to secure a debt, and sent the note to B by mail. B sent the note back, saying he would not accept it unless the rate of interest was increased and the time shortened. A then destroyed the note. B allowed his original claim to outlaw, and having taken a copy of the note, sues upon it, alleging original to have been destroyed. Can he recover? J. P. W.
Youngstown, O.

21. The laws of Dakota (penal code) make it a misdemeanor for one to do business with the addition of "& Co." to his name, there being no partner. A does business in Indiana under the name and style of "A & Co.," and his agent sells a bill of goods in Dakota. Payment is not made; suit is brought in Dakota, and the above statute is pleaded in bar. Can such a defense be successfully maintained? The purpose of the law is of course to protect the creditor who may give credit on the faith of the "& Co.," without particular investigation. Can the debtor take advantage of the provision and escape payment of his debts?
Minneapolis, Minn. X.

22. A brings action for damages against B, a railroad company, for injuries sustained by reason of a collision with defendant's train at a highway crossing, the view at which is obstructed by a large dwelling house standing twenty-four feet from the track in the direction plaintiff approached the crossing, and other buildings erected by defendant, which made it impossible to see an approaching train until almost immediately upon the track. The jury "rendered" a special verdict in answer to the questions propounded by the court, and find first, that defendant did not blow the whistle or ring the bell while approaching the crossing. Second, that "plaintiff, in approaching the crossing, looked and listened where looking and listening would be of avail in discovering an approaching train." But in answer to the eighth question, which reads as follows: "Did plaintiff, in approaching the crossing in question, exercise ordinary care and caution in so doing?" they answer, "he did not, after passing the southwest corner of the dwelling house," which is twenty-four feet from the track. Query: On motion for judgment upon this verdict, can the court declare as a fact that the negligence on the part of plaintiff, so found by the jury, contributed to the injuries, and grant defendant's motion for judgment? or is it a material fact that comes solely within the province of the jury to determine?
Winona, Minn. J. A. T.

LEGAL EXTRACTS.

THE WIT OF LAWYERS.

First there is the wit of repartee. This is the form most easily cultivated, and most provocative of laughter. To talk back is easy; and a court room crowd are generally ready to laugh with each side in turn, without waiting for anything really witty to be said. A war of words is in itself entertaining to the common mind. There something so helpless and harmless in wordy abuse, and so foolish often in the useless irritation it provokes, that idle spectators are ready to laugh without knowing or thinking whether they are laughing at the bombast which speaks, or the sensitiveness which winces. But real wit in repartee has no better field than in the contests of the court room; and he who can illumine the argument or the course of evidence with genine humor, wins an intelligent sympathy and appreciation.

Humor is the great opportunity for lawyers. They see more of the humors of life than any other class; for they are the quickest to penetrate its shams, to comprehend the weaknesses—amiable and unamiable—of those about them, and they should have a keener sense of the ludicrous than others, because they have a better opportunity than others to exercise it.

Then there is the wit of lucidity, which is probably the highest and most useful form of wit in

professional life. This is wit in the sense in which that word is used in the saying that a proverb is the wisdom of many, expressed by the wit of one. Lord Bacon's great power was the wit of lucidity. His terse, pat, apt, antithetic, pithy sayings were the ready vehicles by which his profound thought got itself disseminated among minds that otherwise would never have received or comprehended it. In saying, for instance, that a magistrate ought to study to make good precedents, as well as to follow them, he packed into two lines an argument against refusing relief in cases of the first impression, more cogent and which has doubtless been more influential than many big briefs and long addresses. Coke was another master of the art of putting things, and had the advantage of using Latin which compels and delights in sententious force.

Whether lawyers are, as a fact, more witty than others or not, it is evident that they have opportunity and advantage in becoming so.—*New York Daily Register.*

NOTES.

——Thomas Platt, barrister at law, Queen's Counsel, and ultimately a baron of the Exchequer, is worthy of a place in any legal records. Well educated, but with no commanding talent, and starting from a comparatively humble position, by industry and perseverance, and most upright and honorable conduct, he achieved his high position, with the respect of the public and of the profession. Yet he violated the obvious intentions of nature, and like Liston, the comedian, imagined himself to be intended for tragedy, and with a face that seemed made to create laughter, would plant upon it the most lugubrious of looks. "Pray," said Lord Lyndhurst to him one day, "spare us that wife and twelve children face." Nevertheless, his appeals to common juries were very effective. The following climax greatly increased the damages awarded to a young lady for whom he was counsel: "And, gentlemen, this serpent in human shape stole the virgin heart of my unfortunate client whilst she was returning from confirmation."

——A suit for divorce was brought in Dakota between parties by the name of Crow. A commission was sent here to take testimony. There was some joking between the counsel about the Caws of Crow against Crow, but it was not until after the testimony was written out that it was noticed that the first three witnesses were Daw, Linnett and Thrush. It was then suggested that the cause should be tried before Vice Chancellor Bird.—*N. J. L. Journal.*

——Even the grave and dignified justices of the Supreme Court of the United States have their little fun now and then. Not long ago, it is said, a lawyer arguing a case before that tribunal, used the word "precedent," accenting the second syllable. Soon he used it again, and accented the first syllable. Then whispered Justice Woods to his next neighbor, Justice Gray: "He pronounced it right the first time." Whereupon Justice Gray asked: "What college were you educated at, Brother Woods?" "At Yale." "Ah! I thought so."—*New York Tribune.*

——An Indiana subscriber is responsible for the following account of the proceedings in a case before a justice of the peace, entitled State of Indiana v. Peter Pitkin: "Peter was charged with a grave and heinous offense, overly common in the Hoosier State, of profanity. The record *verbatim* reads: 'The jury retired for their deliberations, after which they brought in the followin' verdict, We the jury disagree and the jury discharged; Prisoner called fur but had takan leg bail and decamped to parts unknown.' "

——In the case of State v. Jenkins, charged with the larceny of six turkeys, the property of one John Stansifer, on trial before Judge Hord and a jury, recently, the defendant's attorney, Mr. John Ferris, made a motion to quash, on the ground of the failure of the indictment to set forth the fact as to whether the turkeys stolen came under the head of wild animals (*fera naturæ*), or whether they were domesticated (*fera domesticæ*), arguing that the rights of property did not vest in wild animals in their native State, and in support of his point made quite a speech, his maiden effort, by the way. In a burst of eloquence he addressed his honor as follows: "Why your honor knows that the woods are full of turkeys who roam through their dim aisles and umbrageous dells in their native State, to the possession of which no man has rights above another." Here the judge interposed by saying: "Mr. Sheriff adjourn court and bring me my gun." The motion was overruled and the case went to the jury, who brought in a verdict of acquittal.

——There is less law, really, among a body of lawyers than among any set of men on earth. Look at it, if you please. What is the old adage, the old rule? I will not repeat the Latin aphorism, because I am not a Latin scholar. But I will give you the English of it, and it is this: "Where the law is uncertain, there is no law." Take your 193 lawyers in the house, and they will debate in high and low debate, and get furious, and after all, after a debate of two and a half days, you can not find two of them who agree about any single proposition of law, to save your lives. See how they are changing here. Why, gentlemen, in all candor and fairness, I would not give the intuitions of an honest rustic's heart in pursuing and attempting to attain the truth, for all the fine-spun arguments of all the lawyers in the universe.—*Jones, of Texas, in Congressional debate.*